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No. 85-1054

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED TRANSPORTATION UNION, et al.,
Petitioners,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
and INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals For the Eighth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION

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Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen, 307 F.2d 151, 158 (5th Cir. 1972), *cert. denied,* 371 U.S. 952 (1973) 5

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PARTIES TO THE PROCEEDINGS

Respondent restates its statement of the Parties To The Proceedings and Rule 28 statement of parent and affiliates contained in its original Brief in Opposition to the Petition herein.

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STATEMENT OF THE CASE

This Supplemental Brief of Respondent Missouri-Kansas-Texas Railroad Company ("MKT") is in response to the Supplemental Brief of Petitioners previously filed herein.

Respondent MKT adopts the Statement of the Case as set forth in its previous Brief in Opposition to the Petition.

SUMMARY OF ARGUMENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent MKT adopts its Summary of Arguments and the arguments related thereto set forth in its original Brief in Opposition to the Petition herein. In addition, the following is a summary of arguments in opposition to points raised by Petitioners in their Supplemental Brief in Support of Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit:

I.

THERE IS NO REQUIREMENT THAT THE ICC OR ANY COURT MAKE A SEPARATE FINDING OF NECESSITY THAT THE 49 U.S.C. § 11341(a) EXEMPTION BE APPLIED. THE EXEMPTION IS AUTOMATIC UPON THE FINDING BY THE ICC THAT A RAILWAY MERGER IS IN THE PUBLIC INTEREST.

II.

THE ATTEMPTED STRIKE BY PETITIONERS IS PROPERLY ENJOINED INASMUCH AS IT ATTEMPTS TO FRUSTRATE THE CONDITIONS ORDERED BY THE ICC TO AMELIORATE THE ANTI-COMPETITIVE EFFECTS OF THE MERGER TRANSACTION HERE INVOLVED. THE DESIRES OF THE UNION MUST, THEREFORE, YIELD TO THE PLENARY ICC-APPROVED MERGER PLAN AND ORDER.

ARGUMENT

Petitioners, in their Supplemental Brief, urge the Court to grant their Petition for a Writ of Certiorari to the Eighth Circuit Court of Appeals on four grounds. First, Petitioners now assert, for the first time, that the Eighth Circuit erred in affirming the district court judgment for the reason that the §11341(a) exemption is not applicable herein for lack of a specific finding by the ICC of necessity for said exemption in connection with the merger transaction here involved. Second, Petitioners, for the first time herein, contend that the Eighth Circuit erred because it did not determine which forum — whether the Federal Courts or the ICC — must determine the necessity of the § 11341(a) exemption. Third, Petitioners urge, as they have before, that the decision of the district court (and now the Eighth Circuit) conflicts with previous opinions of this Court and other Circuit Courts of Appeals. Finally, Petitioners claim that before an injunction could be issued herein, there must be an independent finding of an illegal strike.

With respect to the first two issues raised by Petitioners, there is no requirement that any agency or court make a separate finding of necessity before the §11341(a) exemption be applied. This Court has made it crystal clear that the §11341(a) exemption is at once self-executing if the ICC determines that a railway merger transaction is in the public interest. *Schwabacher v. United States,* 344 U.S. 182 (1952).

The court in *Schwabacher v. United States, supra,* addressed the exemption provision of the Interstate Commerce Act and its role in a railroad merger transaction. The exemption provision was then Section 5(11) — now 49 U.S.C. § 11341(a). In that case, the court held:

> "Approval of a voluntary railroad merger is dependent upon three, and upon only three, considerations: First, a finding that 'it will be consistent with the public interest' (§5(2)(b)). Second, a finding that, subject to any modifica-

> tion made by the Commission, it is 'just and reasonable' (§5(2)(b)). Third, assent of a 'majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote' (§5(11)). (emphasis added).

(*Id.* at 194).

The court then stated that:

> "When these conditions have been complied with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of restraints, limitations, and prohibitions of law, Federal, State or municipal, insofar as may be necessary to enable them to carry into effect the transactions."

Likewise, *Brotherhood of Locomotive Engineers v. Chicago & Northwestern Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963) made it abundantly clear that there is no separate requirement of a finding of necessity. The ICC, after determining that the merger is in the public interest, need not make a further finding that the exemption is necessary to carry out the merger. There is no requirement that any court make a determination that the exemption is necessary to carry out the merger. The exemption is automatic when the ICC approves the transaction. The district court and the Eighth Circuit correctly concluded that there was no need to address Petitioners' so-called finding of necessity argument.

Petitioners' third point is that the Eighth Circuit's opinion conflicts with case law concerning the relationship between the Norris-LaGuardia Act and the § 11341(a) exemption. As this Respondent demonstrated at Pages 9 and 10 of its original Brief in Opposition to the Petition for a Writ of Certiorari herein, the case law is absolutely consistent with other cases dealing with a

clash between the Norris-LaGuardia Act and the Interstate Commerce Act. If application of the Norris-LaGuardia Act would frustrate the ICC's conditions for an approved transaction, the §11341(a) exemption must preempt the Norris-LaGuardia provisions. *Schwabacher v. United States, supra; Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen,* 307 F.2d 151, 158 (5th Cir. 1972), *cert. denied,* 371 U.S. 952 (1973). (See Respondent's discussion of this point at Pages 9 and 10 of its original Brief.)

Finally, Petitioners seem to claim that the District Court could not issue an injunction herein without independently determining that the threatened strike is improper. Petitioners' reasoning seems to be that under the Railway Labor Act, a "major dispute" is the subject of bargaining until the bargaining process is exhausted, at which time the union is free to exert its economic strength to enforce its demands through a strike unless the strike is otherwise illegal — i.e., involving violence, secondary boycott, etc.

What Petitioners constantly ignore is that the strike here in question attempts to destroy the conditions of an ICC-approved merger. The UTU attempts to destroy the ICC-approved method of ameliorating the anti-competitive effects of the merger between the Missouri Pacific and the Union Pacific Railroads. Conditions of an approved merger transaction may not be changed through economic force nor through agreement. *Norfolk & Western Railway Company v. Nemitz,* 404 U.S. 37 (1971), *reh'g denied,* 404 U.S. 1026 (1972); *Brotherhood of Locomotive Engineers v. Chicago & Northwestern Railway Co., supra.*

The UTU cannot be allowed to unravel the largest ICC-approved merger transaction in the history of this Nation. The strike is illegal. The strike was properly enjoined.

CONCLUSION

For all of the foregoing reasons and for the reasons set forth in the Brief of Respondent MKT in Opposition to the Petition, the Petition for a Writ of Certiorari to the Eighth Circut Court of Appeals should be denied.

Respectfully submitted,

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